IN THE

Supreme Court of the United States.

HOSEA B. TULLIS, *Plaintiff in Error*,

v.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

This case presents the question whether the employers' liability act of Indiana, in so far as it relates to this case, is in conflict with that clause of the fourteenth amendment which declares that a state shall not deny to any person the equal protection of the laws.

The certificate shows that Tullis, while in the service of the railway company, sustained a personal injury by the negligent act of a fellow-servant.

The Indiana statute was passed March 4, 1893.

Acts 1893, p. 294.

On March 7, 1895, section 2 was repealed, with a proviso saving rights already accrued under it.

Acts 1895, p. 148.

The act of 1893 is embraced in the Revised Statutes of 1894, vol. 3, section 7083, *et seq.*

Section 1 (7083) is the only part certified, and reads as follows:

"7083. LIABILITY FOR PERSONAL INJURIES.—1. That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or directions the injured employe, at the time of the injury, was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The remaining sections are not material to the present discussion.

Sufficient appears upon the certificate to show that Tullis predicated his action upon the fourth clause of

section one, as that clause is the only part of the law relating to the liability of an employer to one servant for injuries suffered by the negligence of a fellow-servant.

We take it this court will not declare the statute unconstitutional unless the very part upon which the action is grounded is in conflict with some certain clause of the constitution.

We ought not to be required to do more than show that the statute as applied to the parties and to the facts in this case, do not affront the fourteenth amendment. Unless said clause 4 does so it would seem the answer will be in the negative.

I.

It is now too late to say that a state may not regulate the liability of railway companies towards their employes for injuries suffered by the negligence of a co-employe, or fellow-servant.

Chicago & N. W. Ry. Co. v. *McLaughlin*, 119 U. S. 566;
Mo. Pac. Ry. Co. v. *Mackey*, 127 U. S. 205;
Minn. & St. Louis Ry. Co. v. *Herrick*, 127 U. S. 210;
Same v. *Beckwith*, 129 U. S. 26, 32;
Holden v. *Hardy*, 169 U. S. 366, 385;
Magoun v. *Ill. Trust & Sav. Bank*, 170 U. S. 283, 294.

This statute was lately challenged by a railway company in the courts of Indiana, in an action by a brakeman for personal injuries suffered by the negligence of the engineer of the train.

Pittsburg, C., C. & St. L. Ry. Co. v. *Montgomery*, 49 N. E. R., p. 583 (not yet reported in the state reports).

So much of the opinion as relates to the federal question is as follows:

"Appellant also contends that the act violates the equality clause of the fourteenth amendment of the constitution of the United States, demanding for every person the equal protection of the laws. The same provision, quoted from the bill of rights in the constitution of this state, is found word for word in the bill of rights of the constitution of Iowa. The supreme court of that state, in upholding the employers' liability act of that state, held that the provision mentioned in the bill of rights in the constitution of that state was, in effect, the same as the equality clause of the fourteenth amendment to the federal constitution, and that the employers' liability act did not violate either constitution in respect of equality of laws or equality of rights secured by each of said provisions, in *Bucklew* v. *Railway Co.*, 64 Iowa 611, 21 N. W. 103. That decision rests largely on two decisions made upon the subject of the constitutionality of the employers' liability act of Kansas and that of Iowa in the supreme court of the United States. Mackey had recovered a judgment for $12,000 damages against the Missouri Pacific Railway Company for injuries caused by a co-employe of that company, which, on appeal, was affirmed by the supreme court of Kansas. From that judgment the company appealed to the supreme court of the United States, on the ground that the Kansas statute violated the fourteenth amendment to the constitution of the United States. But that court affirmed the judgment, holding that the act in no way infringed that amendment. *Railway Co.* v. *Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161. Mr. Justice Field, speaking for the court, there said: '* * * The company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employes caused by the negligence or incompetency of a fellow-servant, which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after a knowledge of his negligence or incompetency. The rule of law is conceded where the person injured and the one by whose negligence or incompetency the injury is caused are fellow-servants in the same common employment, and acting under the same immediate direction. * * * Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company * * * is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken, and thus authorizes, in such cases, the taking of property without due

process of law, in violation of the fourteenth amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. * * * The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow-servant in the same general employment and acting under the same immediate direction. That its passage is within the competency of the legislature we have do doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees, and the bridging of navigable rivers, are instances of this kind. * * * A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed. * * * But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public.' A like decision was made by the same court, upholding the employers' liability law of Iowa, which has been in force in that state ever since 1862. *Railway Co.* v. *Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176. The Iowa statute is expressed in fewer words and better language than our own. It reads thus: 'Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corpora-

tion, in consequence of the neglect of agents or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.' Code Iowa, 1873, section 1307. Herrick was injured in Iowa by the negligence of a fellow-servant in the employ of said railroad company. He sued and recovered against the company on the Iowa statute in the state court of Minnesota, which judgment was affirmed in the supreme court of that state, upholding the constitutionality of the Iowa statute. *Herrick* v. *Railway Co.*, 31 Minn. 11, 16 N. W. 413; *Id.*, 32 Minn. 435, 21 N. W. 471. On appeal to the supreme court of the United States, the constitutionality of the Iowa statute was upheld on the authority of *Railway Co.* v. *Mackey*, *supra*, as above stated. Some 10 or 12 states of the Union have such acts on their statute books, and none of them have ever been held unconstitutional, while the following decisions of state supreme courts have held such legislation to be constitutional and valid: *McAunich* v. *Railroad Co.*, 20 Iowa 338; *Bucklew* v. *Railway Co.*, 64 Iowa 603, 21 N. W. 103; *Rose* v. *Railroad Co.*, 39 Iowa 246; *Railway Co.* v. *Peavey*, 29 Kan. 169; *Railway Co.* v. *Mackey*, 33 Kan. 298, 6 Pac. 291; *Herrick* v. *Railway Co.*, 31 Minn. 11, 16 N. W. 413; *Id.*, 32 Minn. 435, 21 N. W. 471; *Attorney General* v. *Railway Co.*, 35 Wis. 425; *Ditberner* v. *Railway Co.*, 47 Wis. 138, 2 N. W. 69. The questions decided by this court in *Townsend* v. *State*, 47 N. E. 19, are analogous to and on the same lines as the cases just cited.

"Appellant's learned counsel have urged upon our attention *Railroad Company* v. *Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, as probably declaring a different rule. The reference to that case is fortunate because, while it does not in the least depart from the rule laid down in the two cases above cited, it lays down some principles governing the subject, doubtless in mind in both of the other judgments of the federal supreme court, but not deemed necessary in these cases to be fully stated. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties, arising out of the peculiar business in which they are engaged, is

a just classification, and not one within the fourteenth amendment. Thus it is frequently required that they fence their tracks, and, as a penalty for failure to fence, double damages in case of loss are inflicted. *Railway Co.* v. *Humes*, 115 U. S. 512, 6 Sup. Ct. 110. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting on others; a duty which can be enforced by the legislature in any proper manner; and, whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection.'

"Objection is made to the validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life and limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad, can not be permitted to litigate the constitutionality of the act as to other corporations. *Henderson* v. *State*, 137 Ind. 552, 36 N. E. 257; *Board* v. *Reeves*, 148 Ind. 467, 46 N. E. 995; *Currier* v. *Elliott*, 141 Ind. 394, 39 N. E. 554. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

"It is also urged, as an objection to the validity of the act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed with railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employes as to call for such special legislation as is called for in case of railroad corporations to protect their employes. We therefore conclude that the act does not violate the constitution, either federal or state."

It will be observed that all the words used in the fourth case, or clause, of the law, appear to relate to railway corporations. The first, second and third cases seem to be nothing more than a statutory declaration of a common law liability.

It already appears from the certificate itself that plaintiff in error, being a railroad employe, brought his action under the fourth clause. This clause is not dependent upon the first, second or third cases above it.

II.

The act being valid as to the railroad company, it can not question the constitutionality of the act as applied to others. Only those whose rights would be prejudiced by the enforcement of an unconstitutional act, provision or clause, will be heard to question its validity.

Brown v. *Ohio, etc., R. R. Co.*, 79 Fed. R. 176;
Pittsburg, etc., Co. v. *Montgomery*, 49 N. E. 587;
Wagner v. *Town of Garret*, 118 Ind., pp. 116–117;
Henderson v. *The State*, 137 Ind., pp. 564–5;
Board v. *Reeves*, 148 Ind. 476;
McKinney v. *State*, 30 Pac. R., p. 296;
Commonwealth v. *Wright*, 79 Ky. 22, s. c. 42 Am. R. 203;
Marshall v. *Donovan*, 10 Bush 681;
Wellington v *Petitioners*, 16 Pick. 96;
Norman v. *Boaz*, 4 S. W. 316;
Sinclair v. *Jackson*, 8 Cowen 543, 578;
Sheshane v. *Bailey*, 20 So. 360;
Black on Const. Law (2d ed.), p. 58;

Cooley Con. Lim. (6th ed.), p. 196;
State v. *Becker*, 51 N. W. 1023;
6 A. & E. Encyc. of Law (2d ed.) 1090, where the cases are well collected and arranged under note 1;
State v. *McNulty*, 73 N. W. 87.

III.

Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the constitution, unless the prohibited parts are unseverable. A severance is easy in this case, if it should be thought that some other corporations might question its validity as to other clauses, which is not admitted, but denied.

Packet Co. v. *Keokuk*, 95 U. S. 80, 89;
Penniman's Case, 103 U. S. 716, 717;
Tiernan v. *Rinker*, 102 U. S. 123;
Kimmish v. *Ball*, 129 U. S. 217;
Henderson v. *State*, 137 Ind. 552, 564–5;
Field v. *Clark*, 143 U. S. 649–696;
Presser v. *Ill.*, 116 U. S. 263;
Cooley on Con. Lim. (6th ed.), p. 209;
People v. *Ill. St. Reformatory*, 36 N. E. 80;
Chicago, etc., v. *Jones*, 37 N. E. 254.

In the case last cited the supreme court of Illinois adopt the text of Judge Cooley, who said:

"The constitutional and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance

with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If the statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion."

Const. Lim. (6th Ed.), p. 211.

In order to reach a discussion, the very learned counsel for the defendant in error must wage their attack from one of the two positions, viz:

1. That the fourteenth amendment prohibits a classification of corporations into (*a*) private, and (*b*) public or municipal corporations.

2. That the amendment prohibits a classification between corporations and natural persons.

As to the first: There is such a wide difference in the organization, purpose and operation between private and municipal bodies corporate that they have long formed separate topics for text-books. Municipal corporations as here used would seem to embrace the state and all of its governmental subdivisions—counties, cities, townships, road and school districts and so forth. The membership is not voluntary, but is imposed by laws for better government. These bodies politic may have persons engaged in their service, civil and military, but the relations of master, servant and fellow-servant can not be well said to exist.

As to the second: The business of the country is carried on by two very different classes of persons, viz: artificial persons, and natural persons. The one is the creature of and derives its power from the law; the other holds it as a natural right. They are treated

differently in very many things, as in taxation, in the kind and amount of property they may own, hold and convey, in making returns of their business public, in different liabilities and damages for their torts, in the time and manner of the payment of wages, and so forth.

Holden v. *Hardy*, 169 U. S. 366.

The relations between the employer and an employe are different as between these two classes. The natural person ordinarily (and always should) gives his personal attention to the safety of his servants. He sees them face to face. They see him. If they are injured by his fault, the damages fall directly upon him. A corporation can act only through agents. If by their fault the employe is injured or killed, the agent usually sustains no loss. It is not to be expected, therefore, that such agents will exercise that care for and control over the employes of another person, to wit, the corporation, as a natural person for his own. The conditions are different. The circumstances are not the same. The state is interested in the safety and welfare of the lives and limbs of its people. And it will add to the care which corporations themselves will take for the safety of their working people to provide that if one of the many, while in his proper place and doing his duty, is injured by another failing to do his duty, that the one injured may look to the corporation itself for redress. It will beget greater and proper care by the corporations, and be conducive to the public safety.

"The state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Lauton v. *Steele*, 152 U. S. 136;
Holden v. *Hardy*, 169 U. S. 391–2.

It may, therefore, well classify, or rather follow the natural classification of employers, and say as to those corporate, they shall receive pay for injuries suffered at the hands of a negligent co-employe. We submit such a classification is not invalid under the equality clause of the fourteenth amendment.

This court has just said:

"What satisfies this equality has not been and probably never can be precisely defined. Generally, it has been said that it only requires the same means and methods to be applied impartially to *all the constituents of a class*, so that the law shall operate equally and uniformly upon all persons in similar circumstances. * * * It merely requires that *all persons subject to such legislation* shall be treated alike *under like circumstances and conditions.* * *

"The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation —and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons *according to their relations.* In some circumstances it may not tax A. more than B., but if A. be of a different trade or profession than B. it may.

"And in matters not of taxation, if A. be a different kind of corporation than B. it may subject A. to a different rule of responsibility to servants than B. (*Mo. Pac. R. R.* v. *Mackey*, 127 U. S. 205), to a different measure of damages than B. (*Minn. & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26), and it permits special legislation in all its varieties.

"In other words, the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

Magoun v. *Ill. T. & S. Bank*, 170 U. S., pp. 294–5.

Now, applying the above rule to the statute in hand, is it not apparent that the conditions and relations of a corporation towards the state, and also towards its employes, are not the same as that of a natural person.

Private corporations through the instrumentality of associated capital, mainly operate the large concerns of this country. The amount of dangerous machinery

and property in use and the number of persons employed in operating these are enormous. It is necessarily supervised and operated by agents who are not its owners, and, generally speaking, they are not able to respond in damages out of their own earnings for accidents and injuries suffered by those under their control. Again, care for others is measured by one's liability for their loss. It is not natural under these conditions to expect that a corporate overseer will use that care for those under his charge to which they are entitled for the safety of their lives and limbs.

And as the corporation, by the common law, is not liable for such want of care, it happens that thousands of worthy men, injured and crippled without their fault, are turned away remediless from the courts of justice.

In this age and time, where the employes in one concern number hundreds and thousands and tens of thousands, it is wholly impossible for each to be acquainted with the character and fitness of his fellows, without which it is not fair to say that he must sustain an injury suffered by the negligent act or conduct of each and all of these. In the old time, servants were few, and knew each other. Now the employes are, generally speaking, strangers to each other. They who aggregate so many together under corporate agencies owe them compensation for loss of life or limb, which naturally comes about under these conditions without their fault.

Government is progressive, and where the courts are bound fast by old, harsh or unjust rules, it is entirely proper that the legislature shall loosen the thrall and enlarge the rights and liabilities of persons so as to promote the public welfare and secure justice to large classes of citizens of the country.

This was doubtless the reason that prompted the legislature of Indiana, in its discretion, to make this act for the good of employes of corporations.

"And so long as there are reasonable grounds for believing that this is so, its decision upon this subject can not be reviewed by the federal courts."

Holden v. *Hardy*, 169 U. S., p. 395.

In conclusion, we beg to say, it does not seem to us that the question certified covers the entire statute, but only so much as relates to the case of the plaintiff in error; but should the court determine otherwise, then we submit the above in support of the view that the classification of the Indiana law was in the power of the legislature to make.

The plaintiff in error respectfully asks this honorable court to make answer to the court of appeals that, in so far as his case is concerned, at most, said act is not in violation of any clause of the federal constitution.

ADDISON C. HARRIS,

Attorney for Plaintiff in Error.

Indianapolis, October 1, 1898.